Supreme Court, U.S.
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No.

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

THE NATIONAL ASSOCIATION OF HOME BUILDERS OF THE UNITED STATES, THE HOME BUILDERS ASSOCIATION OF VIRGINIA AND THE HOME BUILDERS ASSOCIATION OF RICHMOND,

Petitioners,

v.

CHESTERFIELD COUNTY, VIRGINIA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I

May the United States Court of Appeals for the Fourth Circuit nullify this Court's decision in *Dolan v. Tigard*, 114 S.Ct. 2309 (1994) which held that when government conditions land use upon the receipt of dedications from the property owner, those dedications must be "roughly proportional" to the projected impact of the proposed land use upon existing public services and infrastructure?

Specifically,

a) In *Dolan*, this Court clearly mandated that where government conditions land use upon the receipt of dedications by the property owner, it is the government's burden to demonstrate that the dedications are "roughly proportional" to the proposed use's projected impact upon existing public infrastructure and services through an "individualized determination." May the United States Court of Appeals for the Fourth Circuit dismiss this Court's mandated requirements simply because in its judgment an "individualized determination" is not "required under the Constitution" or "feasible in practice"?

b) In arriving at its decision in *Dolan*, this Court differentiated between cases where government employed its public health, safety and welfare powers to classify areas as to land use (i.e. *Agins v. Tiburon*, 447 U.S. 255, 260 (1980)) and those instances when government conditioned land use upon the receipt of dedications from the property owner (*Dolan*). In cases such as the instant action, may courts refuse to apply the *Dolan* standard of review and, instead, continue to rely upon the *Agins* standard of review?

II

When this Court has stated that the Fifth Amendment is as much a part of the Bill of Rights as the First and Fourth Amendments, should not a more stringent standard of review be applied to cases involving government action impinging upon the people's Fifth Amendment rights?

III

Did both the United States Court of Appeals for the Fourth Circuit and the United States District Court for the Eastern District of Virginia err in upholding the Chesterfield County, Virginia Official Cash Proffer Policy when the Policy fails to conform to, and, indeed, is violative of, *Dolan*'s standards?

Specifically,

a) May Chesterfield County condition land use upon the payment of cash and real property dedications where the cash payments and real property dedications are not "roughly proportional" to the proposed land use's projected impact upon existing public infrastructure and services?

b) May Chesterfield County refuse to conduct individual determinations when it requires dedications as a condition of land use in order to demonstrate that the required dedications are "roughly proportional"?

c) May Chesterfield County "bank" dedications exacted from property owners as a condition of land use in order to implement its Capital Improvement Program for future countywide use?

PARTIES TO THE PROCEEDING

Petitioners—the National Association of Home Builders of the United States ("NAHB"), the Home Builders Association of Virginia ("HBAV") and the Home Builders Association of Richmond ("HBAR")—are affiliated not-for-profit trade organizations.[1] Petitioners represent the interests of the building and construction industry. In this action, Petitioners are specifically representing the interests of its many members who are involved in the construction of residential homes in Chesterfield County, Virginia. These members are required to pay cash and to dedicate real property to Respondent Chesterfield County as a condition of favorable action on their residential rezoning applications.

Respondent Chesterfield County, Virginia is a political subdivision of the Commonwealth of Virginia. Chesterfield County adopted and administers its Official Cash Proffer Policy ("Policy") which is the subject of this action. The Policy requires Petitioners' members to pay cash and to dedicate real property to Chesterfield County as a condition for the right to construct residential housing.

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[1] Petitioners have no parent companies or nonwholly owned subsidiaries. Lists of Petitioners' members were provided to the Clerk of the United States Court of Appeals for the Fourth Circuit.

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CHESTERFIELD COUNTY, VIRGINIA,

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PETITION FOR WRIT OF CERTIORARI

The National Association of Home Builders of the United States, the Home Builders Association of Virginia and the Home Builders Association of Richmond respectfully seek certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit ("Opinion"), unpublished, is reproduced as Appendix A1-A7. The Opinion affirms the November 29, 1995 decision of the United States District Court for the Eastern District of Virginia, published at 907 F. Supp. 166, and reproduced at Appendix B1-B4.

JURISDICTION

This is an action for declaratory and injunctive relief. Specifically, Petitioners contend that Chesterfield County's

Policy is facially invalid in violation of the United States Constitution, Amendments Five and Fourteen. The United States District Court for the Eastern District of Virginia maintained jurisdiction over this action pursuant to the provisions of 28 U.S.C. §§ 1331, 2201 and 2202. The Petitioners appealed to the United States Court of Appeals for the Fourth Circuit pursuant to the provisions of 28 U.S.C. § 1291.

The United States Court of Appeals for the Fourth Circuit entered its judgment on July 30, 1996. This Court maintains jurisdiction pursuant to the provisions of 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution, Amendment Five:

> . . . nor shall private property be taken for public use, without just compensation.

United States Constitution, Amendment Fourteen:

> Section 1 . . . nor shall any State deprive any person of life, liberty, or property without due process of law.

Chesterfield County's official Cash Proffer Policy—the subject of this action—is reproduced herein as Appendix C1-C5.

STATEMENT OF THE CASE

A. Factual Background

The Policy is nothing more than an impact fee. It is "applicable to all residential rezoning requests."[1] The Policy functions to exact monies and real property from residential rezoning applicants—typically builders and developers—in order to pay for the construction of new public facilities such

[1] Appendix ("App."), C3.

as schools, roads, parks, libraries and fire stations.[2] Chesterfield County's implementation of the Policy assumes that all other tax revenues are required for the operating costs of county government, "but that there is nothing left over to pay for the cost of capital facilities. . . ."[3]

The dedications required by Chesterfield County vary; actual cash proffers and real property dedications required by the Policy are calculated based upon generalized components,[4] using "Countywide averages."[5] Chesterfield County makes no individualized determinations, but rather relies upon a generic study conducted years ago to assess the alleged costs of new housing generally.

According to the Policy's terms, collected "[c]ash proffers must be used to fund projects in the [Chesterfield County] Capital Improvement Program."[6] Cash proffers not used for intended purposes within 15 years of receipt will be returned."[7]

B. Procedural Background

1. The District Court

NAHB, HBAV and HBAR filed their original Complaint for Declaratory Order and Injunctive Relief on May 22, 1995. The Complaint alleged that Chesterfield County's Policy was facially invalid, in violation of the United States Constitution, Amendments Five and Fourteen. Specifically, the Complaint alleged that the Policy—which requires dedications of

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[2] App., C3.

[3] App., C1.

[4] App., C1-C2.

[5] App., Cl. During fiscal year 1995, the so-called "maximum cash proffer amount" was $5,083.00 per residential building lot. App., C5. This amount has now increased twice based upon an automatic indexed formula incorporated into the Policy. App., C5.

[6] App., C3.

[7] App., C5.

cash and land as a condition of land use—violated this Court's standard enunciated in *Dolan v. City of Tigard*, 114 S.Ct. 2309 (1994).

The violation consists of Chesterfield County's failure to conduct "individualized determination[s]" in order to determine the impact of a proposed residential development prior to exacting cash and land from the developer. As this Court noted in *Dolan*, absent the "individualized determination", there can be no showing that the Policy's required dedications are "roughly proportional" to the proposed development's impact on existing public services and infrastructure.[8]

The District Court initially dismissed the original Complaint for lack of subject matter jurisdiction. Thereafter, the District Court allowed the filing of the Plaintiffs' First Amended Complaint for Declaratory Order and Injunctive Relief on August 1, 1995. On November 27, 1995, the District Court considered the parties' cross-motions for summary judgment. The District Court entered its Final Order on November 29, 1995, denying Plaintiffs' requested relief.

The District Court's Final Order declined to apply the *Dolan* test to this case challenging the Policy.[9] Moreover, the District Court applied the standard of review enunciated in *Agins v. Tiburon*, 447 U.S. 255, 260 (1980) to determine the Policy's validity.[10] The District Court concluded that the Policy was facially valid and that even if *Dolan* did apply, the Policy was capable of being applied consistent with *Dolan*.[11] The District Court's reasoning was that there was nothing in

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[8] *Dolan*, 114 S.Ct. at 2319-20.

[9] App., A7.

[10] App., A3-A4.

[11] Id.

the Policy which prevented Chesterfield County from making an "individualized determination" in order to demonstrate the "rough proportionality" of the required dedications.[12]

NAHB, HBAV and HBAR appealed the District Court's Final Order on December 20, 1995.

2. The Circuit Court

On July 30, 1996, the United States Court of Appeals for the Fourth Circuit affirmed the District Court's decision, largely adopting the District Court's reasoning.[13] Like the District Court, the Circuit Court applied the *Agins* standard of review as opposed to the *Dolan* standard of review in evaluating the Policy's validity.[14] The Circuit Court went further, however, rejecting *Dolan's* "individualized determination" requirement.[15] The Circuit Court likened the "individualized determination" requirement to an "exact proportionality" standard, which it stated was "not required under the Constitution, nor feasible in practice."[16]

This Petition for Writ of Certiorari is timely, having been filed on October 25, 1996. Petitioners seek this Court's review of the Circuit Court's decision which radically departs from, and, indeed, repudiates, this Court's controlling precedent.

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[12] *App., A3-A4.* Notably, the District Court did not find that Chesterfield County conducted "individualized determination[s]" or that the Policy provided for, or required, an "individualized determination." Indeed, Chesterfield County does not conduct, nor does the Policy require, "individualized determination[s]" when dedications are required as a condition of the use of property.

[13] App., B4.

[14] App., B3.

[15] App., B4.

[16] *Id.*

SUMMARY OF REASONS WHY THE WRIT SHOULD ISSUE

First, the writ should issue because this Court needs to exercise its supervisory power in order to correct the Fourth Circuit's radical departure from, and blatant repudiation of, this Court's precedent, as well as the Fourth Circuit's sanctioning of the District Court's refusal to apply this Court's precedent. Despite this Court's clarity with respect to the standards applicable to instances where government conditions land use upon dedications, the Fourth Circuit substituted its judgment, dismissing this Court's precedent.

Second, there is some conflict and confusion below as to other aspects of this Court's Fifth Amendment jurisprudence. There is a large gap for this Court to fill with respect to the applicable standard of review for *Dolan* type cases. There is also conflict and confusion on the application of *Dolan* to legislative actions and to monetary dedications. Clarification by this Court is required in order to provide the necessary guidance to ensure the consistent protection of the people's Fifth Amendment rights.

Third, and finally, the Policy violates the United States Constitution. Unless property owners agree to pay for the construction of capital facilities in Chesterfield County—irrespective of any need created by a proposed development—Chesterfield County will use its zoning powers to deny the use of the land. In other words, these property owners are required to bear the brunt of providing the entire Chesterfield County population with public facilities. This requirement contravenes the principal purpose of the Fifth Amendment's Takings Clause which is "to bar Government from forcing some people alone to bear public burdens which in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

REASONS WHY THE WRIT SHOULD ISSUE

A. CERTIORARI SHOULD BE GRANTED TO CORRECT THE FOURTH CIRCUIT'S DEFIANCE OF THIS COURT'S MANDATE

When government requires dedications of a property owner as a condition for the otherwise lawful use of his property, the dedications must be "roughly proportional" to the projected impact of the proposed use. The government bears the burden of demonstrating that the dedications are "roughly proportional" by conducting an "individualized determination" of the proposed land use's impact upon existing public infrastructure and services. This requirement is the mandate of this Court's decision in *Dolan v. City of Tigard*, 114 S.Ct. 2309 (1994).

While the Court's *Dolan* decision is clear and straightforward in its reasoning, the United States Court of Appeals for the Fourth Circuit has failed to comprehend its meaning. Indeed, the Fourth Circuit's opinion repudiates this Court's mandate as being beyond the United States Constitution's requirements. This Court should grant certiorari in order to correct this impudence.

1. The Fourth Circuit Rejects This Court's Clear Mandate

The Fourth Circuit's refusal to properly apply *Dolan* to the Chesterfield County Policy is inexplicable.[17] First, the Fourth Circuit flatly rejects this Court's mandate with respect to the "individualized determination" requirement.[18] According to the Fourth Circuit, the "individualized determination" requirement "clearly is not required under

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[17] The District Court's refusal to apply *Dolan* is equally baffling. The *Dolan* decision, the Plaintiffs' initial pleadings, the Policy's language—all point to the application of *Dolan* in this action.

[18] App., B4.

the Constitution"—despite *Dolan's* finding to the contrary—"nor feasible in practice."[19]

Second, the Fourth Circuit misreads *Dolan's* import by applying the *Agins* standard of review.[20] *See Agins v. Tiburon*, 447 U.S. 255, 260 (1980). This Court has clearly differentiated *Dolan* type cases from *Agins* type cases. *Dolan*, 114 S.Ct. at 2316-17. The *Agins* standard is not applicable to *Dolan* cases for the simple reason that *Agins* involved an entirely different legal question than that presented in *Dolan*. *Agins* involved broad classifications of land—zoning—while *Dolan*, as in this case, involved the requirement of dedications as a condition of land use. As discussed more fully below, this Court should take this opportunity to clarify the appropriate standard of review for *Dolan* type cases.

The sum of the Fourth Circuit's defiance and misapplication of *Dolan* is that the Fourth Circuit incorrectly found that the Policy was constitutionally sound. In fact, the Policy is nothing more than "an out-and-out extortion whereby developers are required to pay for the privilege of using their land for valid and reasonable purposes. . . ." *J.E.D. Associates, Inc. v. Atkinson*, 432 A.2d 12, 14 (N.H. 1981) (town zoning regulation requiring property dedications as condition of subdivision approval held unconstitutional).[21] And, as discussed below, similar to the situation in *Simpson v. City of North Platte*, 206 Neb. 240, 292 N.W. 2d 297 (1980), the Policy is a method by which Chesterfield County "banks" cash and land exacted from developers in order to pay for

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[19] App., B4. Indeed, at the July 8 hearing, Circuit Judges Russell and Widener expressed their disdain for this Court's *Dolan* decision by flatly stating that the "individualized determination" requirement was "stupid".

[20] App., B3.

[21] It is hard to imagine a more valid, reasonable and American use of land than the construction of homes.

future public improvements.[22] There is no justification for this sort of funding scheme which forces a disfavored few to pay for the benefit of the many while allowing elected public officials to avoid the riskier course of raising taxes.

2. "Individualized Determinations" Do Not Equate With "Exact Proportionality"

The Fourth Circuit rationalized its rejection of this Court's "individualized determination" requirement by claiming that the requirement approaches "exact proportionality."[23] Semantics aside, the Fourth Circuit's rationalization overlooks the factual predicate of the *Dolan* decision.

In *Dolan*, the city of Tigard developed and codified a comprehensive plan governing development in its Central Business District.[24] Tigard also conducted a separate transportation study as well as developing a Master Drainage Plan and a Park Plan.[25] Thereafter, when Mrs. Dolan submitted her building permit application, Tigard evaluated her application based upon these plans.[26] Tigard's evaluation made the following findings to justify its dedication requirements:

1) it is reasonable to assume that customers and employees could use the pedestrian/bicycle path;

2) the pedestrian/bicycle path could offset some of the expected traffic congestion;

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[22] This Court discussed the *Simpson* case at length in *Dolan*, relying upon its reasoning to arrive at the "roughly proportional" standard. *Dolan*, 114 S.Ct. at 2319.

[23] App., B4.

[24] *Dolan*, 114 S.Ct. at 2313.

[25] *Id.*

[26] *Id.* In contrast to Tigard's multiple plans, Chesterfield County applies its one "one-size-fits-all" study, which allegedly assesses the costs of housing generally.

3) there is a reasonable relationship between the proposed development and the Greenway dedication requirement; and,

4) there is a reasonable relationship between alleviating traffic and the proposed pedestrian/bicycle path.[27]

Despite Tigard's multiple studies, its application of these studies to Mrs. Dolan's application, and its formal findings, this Court found Tigard's justification for seeking dedications as a condition of the issuance of a building permit to be inadequate.[28]

Comparatively speaking, the Policy's generic study does not even meet the specificity of Tigard's studies, much less this Court's constitutional standards. Clearly, if Tigard must make "more stringent individual determinations", Chesterfield County should not be allowed to simply plug numbers into its general and generic formula. If *Dolan* means anything, it means that "one size does [*not*] fit all" when government conditions land use upon the receipt of dedications.

B. CERTIORARI SHOULD BE GRANTED TO CLARIFY THE STANDARD OF REVIEW TO BE APPLIED TO *DOLAN* CHALLENGES

1. The *Agins* Standard Of Review Is Inappropriate To *Dolan* Challenges

The Fourth Circuit held that the Policy was invalid "only if it denies a property owner economically viable use of his land or fails to advance legitimate state interests."[29] That standard of review—the *Agins* standard—is incorrect and inapplicable to *Dolan* challenges. This Court went to some

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[27] *Dolan*, 114 S.Ct. at 2314-15.

[28] *Dolan*, 114 S.Ct. at 2321.

[29] App., B3, citing *Agins v. Tiburon*, 447 U.S. 255, 260 (1980).

lengths in *Dolan* to distinguish that case from *Agins*.[30] Indeed, under the facts of *Dolan*, the application of the *Agins* standard of review would have rendered a decision in favor of Tigard, since the permit conditions did not deprive Mrs. Dolan of the economically beneficial use of her property and the permit conditions did advance legitimate state interests.[31]

This Court explained the differences between *Agins* and *Dolan* by noting that *Agins* involved zoning limitations on the use of property, while *Dolan* concerned the requirement that Mrs. Dolan dedicate property as a condition of land use.[32] The differences present in *Dolan* are also present in this action. The Policy does not serve to classify areas of Chesterfield County as to appropriate use (i.e. residential, commercial, industrial, etc.). Rather, the Policy denies residential zoning to agricultural land unless the rezoning applicant agrees to pay cash and to dedicate land to Chesterfield County. An applicant must thus pay in order to make the best use of his land.[33]

2. The Same Deference Given First Amendment Challenges Should Be Afforded To Fifth Amendment Challenges

This Court has stated that the Fifth Amendment is "as much a part of the Bill of Rights as the First Amendment . . . ;" it "should [not] be relegated to the status of poor relation. . . ." *Dolan*, 114 S.Ct. at 2320. Based upon that reasoning, its seems logical that the standard of review

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[30] *Dolan*, 114 S.Ct. at 2316.

[31] *Thus, Agins* cannot have any application to cases where government conditions land use upon the receipt of dedications from the property owner.

[32] *Dolan*, 114 S.Ct. at 2316.

[33] As opposed to *Agins* where the zoning ordinance aimed at maximizing open spaces did not prevent residential construction. *Agins*, 447 U.S. at 262.

applicable to First Amendment challenges should also be applicable to Fifth Amendment challenges.[34]

"When a statutory provision burdens First Amendment rights, it must be justified by a compelling state interest." *Federal Election Comm'n v. Mass. Citizens for Life*, 479 U.S. 238, 256 (1986) (federal election statute held unconstitutional as applied to organization due to lack of compelling state interest) (citations omitted). Moreover, "[i]t is not enough to show that the Government's ends are compelling, the means must be carefully tailored to achieve those ends." *Sable Communications of California, Inc. v. F.C.C.*, 492 U.S. 115, 126 (1989) (federal statute banning indecent telephone messages held unconstitutional because it was insufficiently narrow to address a compelling state interest.) Government may pursue legitimate and compelling state interests, but where government action impinges upon constitutionally protected rights, " 'it must do so by narrowly drawn regulations designed to serve those interests without unnecessarily interfering with . . . [constitutionally protected] freedoms. . . .' " *Sable Communications*, 492 U.S. at 126.

There is no reason—logically or constitutionally speaking—why courts should not apply this same stringent standard of review to government actions which impinge upon the people's Fifth Amendment rights. This Court has already stated the obvious—that the Fifth Amendment is as much part of the Bill of Rights as the First Amendment. This case now provides this Court with the opportunity to provide the

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[34] This logic is merely an extension of the expansive trend of this Court's property rights jurisprudence. Since 1987, beginning with *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987) wherein this Court held that property owners must be compensated for temporary takings, this Court has since consistently expanded the concept of property rights. *See Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992); *Dolan*, 114 S.Ct. 2309 (1994).

lower courts with badly needed direction for the proper resolution of *Dolan* type Fifth Amendment challenges.

3. This Court Should Clarify That *Dolan* Is Applicable To Legislative Actions And To Monetary Exactions

The resistance to *Dolan* is not confined to the Fourth Circuit or the Eastern District of Virginia. Many courts throughout the county have sought to limit or neuter *Dolan*, while other courts have attempted to fairly apply *Dolan* to government actions which burden Fifth Amendment rights. For example, many courts have declined to apply *Dolan* to legislative "takings", while others have agreed with the wisdom of Justices Thomas and O'Connor who have stated:

> It is not clear why the existence of a taking should turn on the type of governmental entity responsible for the taking. A city council can take property just as well as a planning commission can.

Parking Association of Georgia, Inc. v. City of Atlanta, 115 S.Ct. 2268 (1995) (Thomas, J. and O'Connor, J. dissenting).[35]

Similarly, some courts have recognized *Dolan*'s applicability to monetary exactions, while other courts deny *Dolan's*

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[35] For example, in *Ehrlich v. City of Culver City*, 911 P.2d 429 (Calif. 1996), *Home Builders Association of Central Arizona v. City of Scottsdale*, 902 P.2d 1347 (Ariz. 1995), *Parking Association of Georgia, Inc. v. City of Atlanta*, 450 S.E. 2d 200 (Ga. 1994), and *Harris v. City of Wichita*, 862 F. Supp. 287 (D. Kan. 1994), the various courts declined to apply *Dolan* to legislative actions. By contrast, the courts in *Northern Illinois Home Builders Association, Inc. v. County of Du Page*, 649 N.E. 2d 384 (Ill. 1995), *J.C. Reeves Corp. v. Clackamas County*, 887 P.2d 360 (Or. 1994), and *Trimen Development Co. v. King County*, 877 P.2d 187 (Wash. 1994) have all held that *Dolan* is applicable to legislative actions.

applicability.[36] This Court's intervention through the review of this case would serve to resolve the conflicts.[37]

C. THE POLICY VIOLATES THE CONSTITUTION

The Policy falls far short of *Dolan's* requirements.[38] There can be no evaluation as to the "rough proportionality" of the Policy's dedication requirements since Chesterfield County fails to conduct the mandated "individualized determination[s]." There are *no* determinations as to any specific development's impact on existing public infrastructure or services—if any.[39]

1. The Policy Contains No Loopholes

The Policy is facially invalid. There are no circumstances under which it could be applied consistent with the constitutional requirements this Court set forth in *Dolan*.

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[36] *See Ehrlich v. City of Culver City*, 911 P.2d 429 (Calif. 1996) (*Dolan* applied to monetary exaction). *Cf. McCarthy v. City of Leawood*, 894 P.2d 836 (Kan. 1995) (*Dolan* not applicable to monetary exactions); *Clajon Production Corp. v. Petera*, 70 F.3d 1566 (10th Cir. 1995) (same).

[37] The Policy is the official adopted action of the Chesterfield County Board of Supervisors—a legislative body. And, as previously noted, the primary exaction required under the Policy is money.

[38] The Policy rejects the "rough proportionality" standard in its very first paragraph wherein it identifies one of its "[u]nderlying [a]ssumptions" as being that it "must only meet a 'reasonableness' test, that there must be some rationale for the approach chosen. . . ." App., Cl. This is the very same test applied by the Oregon Supreme Court and rejected by this Court in *Dolan*. *See Dolan*, 114 S.Ct. at 2320-23. Indeed, under this Court's precedents, there must be an "essential nexus"—not a relationship—between a "legitimate state interest" and the cash and land dedications required by the Policy. *Nollan*, 483 U.S. at 837.

[39] It is highly probable that some residential projects would have *no* impact upon existing public infrastructure and services.

a. The Policy is mandatory and universally applied to residential rezoning applications

The Policy clearly states that "[c]ash proffers *will* be applicable to all residential rezoning requests."[40] In other words, all applicants—irrespective of any need generated by their development—will pay monies and/or dedicate land to Chesterfield County.[41] The amount paid may not necessarily be the maximum, but some amount shall be paid if the applicant wishes to develop his land.[42]

b. Cash proffers are not based upon any "individualized determination"

The Policy relies upon countywide averages "to determine the cost per dwelling unit of a public facility."[43] Chesterfield County performs no individual studies to determine the impact of a proposed development even though this Court *mandates* such individual determinations if the government conditions land use upon dedications by the landowner.[44]

Moreover, the Fourth Circuit's and the District Court's opinions which held that the Policy did not prevent Chesterfield County from making "individualized determination[s]" miss the point. *Dolan* does not *allow* government to make "individualized determiation[s]", it *requires* them where government requires dedications as a condition of land use.

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[40] App., B3. (emphasis added).

[41] App., B3.

[42] There is, however, no way of knowing if these amounts are "roughly proportional" absent an "individual determination."

[43] App., C1.

[44] *Dolan*, 114 S.Ct. at 2319-20. "[T]he city *must* make some sort of individualized determination that the required dedication is related in nature and extent to the impact of the proposed development." (emphasis added)

The "individualized determination" is a mandate, not merely a good idea. *Dolan* 114 S.Ct. at 2319-20.[45]

c. Cash proffers required and paid are not "roughly proportional"

According to the Policy, "[t]here must be a relationship between the rezoning itself and the need for a public facility."[46] This is not a "roughly proportional" standard or even a "reasonable relationship" standard. Indeed, this is the lowest possible standard and it was rejected by this Court in *Nollan*.[47]

d. Cash proffers are not used for public needs necessitated by an applicant's development

Chesterfield County does not ask a developer to pay cash and to dedicate land in order to offset an impact resulting directly from his development. Rather, the cash and land dedications collected from residential rezoning applicants are put into a fund for countywide improvements. Chesterfield County assumes that the cash and land dedications are needed to fund new public facilities generally.[48] Chesterfield County also assumes that new development is the sole catalyst for any increased demand on public facilities.[49] Cash and land dedications must be used to fund projects in the "Capital Improvement Program."[50] These "improvements" are "schools, roads, parks, libraries and fire stations."[51] If the

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[45] The opinions below also ignore the uncontroverted evidence that Chesterfield County does not —and never has—conducted an "individualized determination" under the Policy.

[46] App., C3.

[47] The only use of the term "reasonable" in the Policy is in the introductory section for the purpose of describing the Policy itself—not the relationship between impacts and required dedications.

[48] App., C1.

[49] *Id.*

[50] App., C3.

[51] *Id.*

"[c]ash proffers [are] not used for the intended purposes within 15 years of receipt will be returned."[52]

e. There are no variance procedures

None. Cash proffers are mandatory.

2. The Policy Violates The Essence Of *Dolan*

In arriving at *Dolan's* "roughly proportional" requirements, this Court relied largely upon the reasoning of the Nebraska Supreme Court in *Simpson v. City of North Platte*, 206 Neb. 240, 292 N.W. 2d 293 (1980). *See Dolan*, 114 S.Ct. at 2319. The facts and holding of that case are sufficiently analogous so as to be applicable to this action.

In *Simpson*, the city of North Platte adopted an ordinance ostensibly aimed at lessening traffic congestion on its streets.[53] The ordinance required the dedication of one-half the street adjacent to a building lot to its comprehensive plan width as a condition of obtaining a building permit.[54] The Simpsons applied for a building permit to construct a fast food restaurant on an affected building lot, but refused to dedicate the required property for street improvement.[55]

North Platte argued that the ordinance was a reasonable exercise of its police power for the purpose of promoting the public health, safety and welfare.[56] Similarly, Chesterfield County claims that the cash proffers are necessary for, *inter alia*, schools and fire protection—elements of public health, safety and welfare. North Platte sought dedications to fulfill its comprehensive road plan which was designed to

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[52] App., C5. That Chesterfield County allows itself *15 years* to spend this money is highly illustrative of the lack of an "essential nexus" between a development's impact and a public need. This is merely a government slush fund. And, not suprisingly, Chesterfield County has never returned a dime to a developer.

[53] *Simpson*, 206 Neb. at 241.

[54] *Id.*

[55] *Simpson*, 206 Neb. at 242-43.

[56] *Simpson*, 206 Neb. at 243.

prevent *future* traffic congestion.[57] Likewise, Chesterfield County uses the cash proffers to fund future projects in its "Capital Improvement Program."[58] It is this "banking" of dedications which best illustrates that the required real property dedications in *Simpson*, and the cash and land dedications required by Chesterfield County, are without the "essential nexus" required by *Nollan*, and are not "roughly proportional" as required by *Dolan*. As noted by the *Simpson* Court:

> "[F]or the nexus test to apply, thus making a compulsory dedication constitutionally valid, the nexus must be rational. This means it must be substantial, demonstrably clear and present. It must definitely appear that the proposed action by the developer will either forthwith or in the demonstrably immediate future so burden the abutting road, through increased traffic or otherwise, as to require its accelerated improvement. Such dedications must be for specific and presently contemplated immediate improvements not for the purpose of 'banking' the land use in a projected but unscheduled possible future use."[59]

It is constitutionally impermissible for government to condition land use upon the dedication of property for future public use. The "land banking" found to be constitutionally repugnant in *Simpson* is no different than Chesterfield County's "money banking", taking cash extorted from developers so as to fund contemplated public projects in its "Capital Improvement Program".

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[57] *Simpson*, 206 Neb. at 241, 246.

[58] App., C3.

[59] *Simpson*, 206 Neb. at 245 (quoting *181 Incorporated v. The Salem Cty. Planning Bd.*, 133 N.J. Super. 350, 359 A.2d 501, 506 (1975)) (emphasis omitted).

The lack of a rational and essential nexus between the required cash and land dedications and a development's projected immediate impact is best illustrated by the use of cash proffers for acquiring 2.34 library books per person, 5.53 acres of park land per 1,000 people, and 99 square feet of elementary school space per child.[60] This is Chesterfield County's wish list for which it requires developers to play Santa Claus. Chesterfield County does not—cannot—show that these items are necessitated by any specific residential development. These "needs" are necessitated by people generally—*not* construction.[61] Thus, the result of Chesterfield County's Policy is to shift the burden from the people—traditionally taxed to pay for public services—to a particular, identifiable class—landowners. This Court must not countenance such a result. "A strong public desire to improve the public condition [will not] warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." *See, Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922). *See also Armstrong v. United States*, 364 U.S. 40, 49 (1960).

CONCLUSION

This Court's opinions are of little value if the lower courts do not recognize and fairly apply them. Where, as

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[60] App.,C2. Developers probably should count their blessings that Chesterfield County does not (yet) require them to pay for landfills and jails. App.,C3.

[61] If the mere fact that people who live in homes might be literate and might wish to check out a book from the library can serve as a reason to justify a dedication from a landowner constructing a residential development, then there is probably no human need which residential developers cannot be forced to fund for the benefit of all. The logical result will be to shift the entire tax burden to landowners in order to benefit everyone.

here, a lower court blatantly repudiates this Court's precedent, it is appropriate for this Court to exercise its supervisory power to correct the situation. Indeed, the failure to do so invites the delegitimization of this Court's authority.

THEREFORE, on the questions presented, Petitioners pray that the writ issue.

Respectfully submitted,

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